Filed 12/11/01

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Appellant,

v.

KIM LAMAR ROBINSON,

Defendant and Appellant.

F035846

(Super. Ct. No. 639515-6)

O P I N I O N

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County, Robert Oliver, Judge.

Elizabeth M. Campbell under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, and Michael J. Weinberger, Deputy Attorney General, for Plaintiff and Respondent.

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[*] Before Harris, Acting P.J., Levy, J. and Cornell, J.

STATEMENT OF THE CASE

On October 5, 1999, the Fresno County District Attorney filed a consolidated information in the central division of superior court charging appellant Kim Lamar Robinson as follows: count I—felony transportation of a controlled substance (Health & Saf. Code, § 11352, subd. (a)); count II—felony possession of a controlled substance for sale (Health & Saf. Code, § 11351); count III—misdemeanor possession of marijuana while driving (Veh. Code, § 23222, subd. (b)); count IV—misdemeanor driving without a license (Veh. Code, § 12500, subd. (a)); count V—making terrorist threats, a felony (Pen. Code, § 422); count VI—misdemeanor battery (Pen. Code, § 243, subd. (e)(1)); count VII—attempted murder (Pen. Code, §§ 187, subd. (a), 664) with personal use of a firearm (Pen. Code, §§ 12022.5, subd. (a)(1), 12022.53, subd. (b)); count VIII—felony assault with a firearm (Pen. Code, § 243, subd. (a)(2)) with personal use of a firearm (Pen. Code, §§ 12022.5, subd. (a)(1), 12022.53, subd. (b)); count IX—shooting at an occupied motor vehicle (Pen. Code, § 246), a serious and violent felony (Pen. Code, §§ 667.5, subd. (c)(8), 1192.7, subd. (c)(8)) with personal use of a firearm (Pen. Code, §§ 1203.06, subd. (a)(1), 12022.5, subd. (a)(1)); count X—felony possession of marijuana for sale (Health & Saf. Code, § 11359); count XI—felony transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)). The district attorney specially alleged appellant had sustained a prior serious or violent felony or juvenile adjudication (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

On October 6, 1999, appellant filed written objections alleging illegal joinder of cases in the consolidated information. On the same date, appellant reserved his joinder objections, was arraigned on the consolidated information, pleaded not guilty to the substantive charges, and denied the special allegations.

On November 18, 1999, the district attorney lodged with the superior court a first amended information charging appellant with 11 substantive offenses.

On March 16, 2000, appellant entered a plea agreement as to the original information. Appellant pleaded guilty to counts I and VIII and admitted the related personal use of a firearm allegation as to the latter count. Appellant also admitted the prior serious felony conviction allegation and a violation of probation in superior court case Nos. F97917463-2 and F97917697-5. The parties agreed to a maximum term of 16 years 8 months in state prison in exchange for dismissal of the remaining substantive counts and special allegations.

On June 5, 2000, appellant appeared in superior court for sentencing and his counsel requested "the Court consider striking the strike pursuant to Romero." The court declined to do so after noting the charged assault entailed an "escalation" in violence and constituted a "more serious violent crime." The court then denied appellant probation and sentenced him to a total term of 12 years 8 months in state prison.

The court imposed the middle term of six years as to count VIII with a consecutive middle term of four years as to the related personal use enhancement. The court imposed a consecutive term of two years eight months as to count I. The court also lifted stays in the violation of probation cases and imposed a term of two years in case No. F97917463-2 and a term of three years in case No. F97917697-5. The court awarded 440 days of custody credits in the instant case and 946 days of custody credits in the violation of probation cases. The court imposed a $2,400 restitution fine (Pen. Code, § 1202.4, subd. (b)) and imposed a second such fine under Penal Code section 1202.45.[1] The court ordered appellant to pay a $50 laboratory testing fee (Health & Saf. Code, § 11372.5, subd. (a)) and to register as a controlled substance offender (Health & Saf. Code,

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[1] The abstract of judgment filed June 13, 2000, incorrectly states the amount of the Penal Code section 1202.4 fine to be "$2,004" and fails to mention the fine imposed under Penal Code section 1202.45. The superior court is directed to correct the abstract of judgment accordingly and to transmit certified copies of the corrected abstract to all appropriate parties and entities.

§ 11590). The court also revoked appellant's driving privilege (Veh. Code, § 13202, subd. (b)).

On June 7, 2000, appellant filed a timely notice of appeal "from the entire Judgment and Sentencing of the Superior Court in the above-entitled cause . . . ."

On November 13, 2000, appellant's counsel filed a brief with this court under the authority of *People v. Wende* (1979) 25 Cal.3d 436.

On January 9, 2001, appellant applied to this court for permission to file an amended notice of appeal to comply with California Rules of Court, rule 31(d).[2] On January 11, 2001, this court granted the Attorney General leave to file a written response to appellant's application.

On February 5, 2001, this court directed the clerk to deem appellant's proposed amended notice of appeal as the amended notice of appeal in this case and to file said amended notice within 10 days.

On the same date, this court denied appellant's written application for new appellate counsel, stating: "The filing by counsel of a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 does not, by itself, constitute grounds to remove counsel."

STATEMENT OF FACTS

The following facts are taken from the probation report filed March 19, 2000:

"Count One: [¶]…[¶]

> "On April 2, 1999, California Highway Patrol officers were patrolling in the area of Olive and Weber Avenues when they observed the defendant, Kim Lamar Robinson, make an illegal U-turn. They initiated a traffic stop and made contact with the defendant. The defendant was shaking uncontrollably, made fidgety movements and his voice cracked as he spoke. He was asked to exit the vehicle and was asked if he had used

[2] The proposed amended notice of appeal stated: "This appeal is to sentencing only, pursuant to rule 31(d), California Rules of Court, and does not challenge the validity of the plea."

any drugs and stated that he had smoked some marijuana earlier in the day and had used cocaine approximately two hours previously. When asked if he had any controlled substances on his person or vehicle he stated, 'Yeah, I got a little coke and marijuana in my pocket. Oh shit, my life is over.' The officer asked if he could retrieve it from his pocket and he stated, 'Yeah.'

"The officer located in the defendant's right front jacket pocket a clear plastic bag which contained a green leafy substance along with two other clear plastic bags that contained a green leafy substance residue which was later analyzed and tested positive to 12.4 grams of marijuana. In his right front pant coin pocket, the officer found two clear plastic bags that contained a white powder and rock like substance which was later analyzed and tested positive to 12.4 grams of cocaine. The defendant was also in possession of $907.00 in cash in denominations of $20.00 dollar bills and $1.00 bills. He also was in possession of a pay/owe sheet with names, telephone numbers and directions, a pager, razor blade.

"The officer asked the defendant if he was selling cocaine and he stated, 'Yeah, I got a bad habit man.' He also admitted to being in possession of a pay/owe sheet for drug sales. As they were talking, the defendant's pager went off and he stated, 'That's probably someone who wants some stuff.'

"Count Eight: [¶]…[¶]

"On May 16, 1999, at approximately 4:40 p.m., victim Anthony [Glasper] was over at his friend Marcu Harrisen's residence. His friend Marcus Harrisen was on the phone with the defendant Kim Robinson. Harrisen told the victim that 'Lamar is trippin.' While at Harrisen's residence, Joaquin Aguirre came over and gave the victim a bullet and stated, 'Lamar is tripping, he said he's going to kill you.'

"The victim left the residence, his vehicle, and as he was leaving he saw the defendant near one of the entrances of the apartment complex and passed his vehicle. The defendant pulled up behind him, followed him and as the victim made a U-turn they were eventually side by side to each other. The victim showed the defendant the bullet, and the defendant pulled out a gun and pointed it at him, shot it two times. One of the bullets hit the driver's door and the other stuck in the driver's window and shattered the window. The victim was able to duck in his seat and drove off. As he was driving away, he struck the center divider and caused damage to his front rim.

"The witnesses were questioned and Joaquin Aguirre stated that the defendant gave him the .38 caliber special bullet and asked him to tell Anthony, 'That bullet has his name on it.'"

DISCUSSION

Appellant's appointed counsel has filed an opening brief which adequately summarizes the facts and adequately cites to the record, which raises no issues, and asks this court independently to review the record. (*People v. Wende, supra,* 25 Cal.3d 436.) By letter of November 13, 2000, this court invited appellant to submit additional briefing and state any grounds of appeal he may wish this court to consider. On February 22, 2001, appellant filed a supplemental letter brief contending, among other things, "[t]his was a case in which I took a plea of 'no contest.' 1. I didn't know I was signing for a strike, & 2. I was under [psychiatric] medication . . . I did not know what I was signing . . . ."

On March 15, 2000, appellant signed a written felony advisement, waiver of rights, and plea form indicating "admits allege (1) strike." At the March 16, 2000, change of plea hearing, the following exchange occurred:

"THE COURT: -- are you under the influence of any alcohol, drugs or narcotics today?

"THE DEFENDANT: No. [¶]…[¶]

"THE COURT: . . . [T]his information also alleges that you suffered a prior serious felony conviction that comes within the meaning of the three strikes law. It states that you were previously convicted of the felony offense of Penal Code Section 245.3 on June 2nd of 1998, and that was in Fresno Superior Court Case No. 91667-5. Do you understand what that's alleging.

"THE DEFENDANT: Yes.

"THE COURT: Do you admit or deny that prior felony conviction?

"THE DEFENDANT: Admit."

Appellant also contends (1) his trial counsel had a conflict of interest because he represented appellant on a prior case and in the present case; (2) the sentencing judge

"did not use his discretion" and "was [b]iased and [m]is-used his discretion" in denying his motion to strike the prior felony conviction under *Romero*; (3) his trial lawyer gave him bad advice regarding his potential sentence; (4) he was not properly advised of the nature of the offense to which he was pleading; and (5) he would like to attack his prior felony conviction allegation and his plea bargain.

A. Conflict of interest

The state and federal Constitutions guarantee defendants effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) This guarantee includes the correlative right to representation free of conflicts of interest. A conflict involves any situation in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his or her responsibilities to another client or a third person or by his or her own interests. Under federal law, in the absence of an objection, a defendant on appeal must demonstrate an actual conflict of interest adversely affected counsel's performance. Under California law, proof of an actual conflict is never required. Even absent an objection, a potential conflict may require reversal if the record supports an informed speculation that the defendant's right to effective representation was prejudicially affected. However, under such circumstances, there must be some discernible grounds to believe that prejudice occurred. (*People v. Dancer* (1996) 45 Cal.App.4th 1677, 1685-1686, fn. 2, disapproved on another point in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123.)

In the instant case, appellant contends:

> "Counsel represented me (client) on prior case & new case, which constitutes a conflict of interest, where I feel counsel did not want to go back to challenge prior due to his representing of prior, & a wanting [to get] case over with. Isn't this not adequate representation & conflict of interest for many obvious reasons[?]"

Under federal law, a criminal defendant may not collaterally attack the validity of a prior conviction on constitutional grounds except a denial of the right to counsel under

Gideon v. Wainwright (1963) 372 U.S. 335. (*People v. Green* (2000) 81 Cal.App.4th 463, 467.) Under California law, a criminal defendant charged with a prior felony conviction may move in the trial court to strike the alleged prior conviction on the ground the trial court in the prior proceeding failed to observe the defendant's rights under *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122, provided the defendant suffered the prior conviction after the date of decision in *Tahl*. (*People v. Allen* (1999) 21 Cal.4th 424, 426-427.)

Nevertheless, a California criminal defendant may not challenge a prior conviction on the ground of ineffective assistance of counsel in the course of a current prosecution for a noncapital offense. Compelling a trial court in a current prosecution to adjudicate this type of challenge to a prior conviction generally would require the court to review the entirety of the record of the earlier criminal proceedings, as well as matters outside the record, imposing an intolerable burden upon the orderly administration of the criminal justice system. (*Garcia v. Superior Court* (1997) 14 Cal.4th 953, 956.)

In the instant case, appellant frames his attack on the prior conviction in terms of trial counsel's conflict of interest. However, his contention actually goes to the adequacy of trial counsel's representation and must be rejected under the authority of *Garcia*.

B. <u>The trial court's exercise of discretion</u>

Appellant contends the trial court was biased and misused its discretion in denying his request under *Romero*. In urging the court to exercise that discretion, defense counsel noted:

> "If the Court were to strike and impose the aggravated on the 245, plus the midterm on the gun, plus the one-third of the midterm on the 11352, the Court could still sentence my client to nine years, four months which is clearly within the plea agreement running the violation of probation concurrent."

The trial court responded:

> "Except then it would be a halftime case, not an eighty percent case, [¶] -- . . . number one. [¶] Number two, the more basic question is

> whether or not this Court believes it is finding a basis under the intent of the Three Strikes legislation and the cases that have come down subsequent to the implementation of that sentencing plan by way -- that would allow the Court to strike the strike if it could. The Court notes that this is a 1997 case. The Court notes that there's not been a change in Mr. Robinson by way of his -- by way of lack of criminality indication or otherwise that would bode in his favor. And while the coffee pot incident is limited violence, one could argue the instant matter before us, the 245, is an escalation and more serious violent crime. Therefore, the Court does not believe under the mandate of the Three Strikes legislation as indicated in the instructions that come to the Court by way of appellate decisions that the Court can strike the strike; and so, it will not."

A court's discretion to strike or vacate prior felony conviction allegations or findings in furtherance of justice is limited. The court's exercise must proceed in strict compliance with Penal Code section 1385 and is subject to review for abuse. In ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the three strikes law, the court in question must consider:

> ". . . [W]hether, in light of the nature and circumstance of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The trial court applied the foregoing principles when it considered and denied defense counsel's request to strike appellant's prior felony conviction under the authority of *Romero*. Reversal on this ground is not required.

C. <u>Trial counsel's advice</u>

Appellant contends his counsel gave him bad advice. According to appellant, counsel indicated he could enter the plea and still have the prior felony conviction stricken. Appellant also maintains counsel told him he could get the lowest term of imprisonment.

In his signed and written felony advisement/waiver of rights/plea form dated March 15, 2000, appellant admitted one strike allegation and acknowledged he could

receive a maximum sentence of 16 years 8 months in state prison as a result of the plea. At the change of plea hearing on March 16, 2000, appellant indicated he was entering his change of plea freely and voluntarily and that he had no questions about the rights or consequences set forth on the written change of plea form. The court asked appellant, "Have any promises or deals been made to get you to enter into this plea today other than what's been stated in the change of plea or on the record?" Appellant responded, "No" and indicated he had had enough time to talk with his counsel about the case.

The record on appeal does not support appellant's contention and his claim must be rejected.

D. Advisement of nature of offense

Appellant summarily contends he was not properly advised of the nature of the offense to which he was pleading, i.e., the strike under Penal Code section 245.3.

The following exchange occurred at the March 16, 2000 change of plea hearing:

> "THE COURT: In this information also alleges that you suffered a prior serious felony conviction that comes within the meaning of the three strikes law. It states that you were previously convicted of the felony offense of Penal Code Section 245.3 on June 2nd of 1998, and that was in Fresno Superior Court Case No. 91667-5. Do you understand what that's alleging?
>
> "THE DEFENDANT: Yes.
>
> "THE COURT: Do you admit or deny that prior felony conviction.
>
> "THE DEFENDANT: Admit."

Once again, the face of the record refutes appellant's contentions on appeal.

E. Prior felony conviction and plea bargain

Appellant seeks to attack both his felony conviction in the prior case and his plea bargain in the instant case. As to the former point, a defendant whose sentence for a noncapital offense is subject to enhancement because of a prior conviction may not employ the current prosecution as a forum for challenging the validity of the prior

conviction based upon alleged ineffective assistance of counsel in the prior proceeding.[3] (*Garcia v. Superior Court, supra,* 14 Cal.4th at p. 966.) As to the latter point, plea bargaining is based upon reciprocal benefits or mutuality of advantage between the prosecution and the defendant. When a guilty plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties must abide by the terms of the agreement. (*People v. Collins* (1996) 45 Cal.App.4th 849, 862)

Our independent review discloses no other reasonably arguable appellate issues. "[A]n arguable issue on appeal consists of two elements. First, the issue must be one which, in counsel's professional opinion, is meritorious. That is not to say that the contention must necessarily achieve success. Rather, it must have a reasonable potential for success. Second, if successful, the issue must be such that, if resolved favorably to the appellant, the result will either be a reversal or a modification of the judgment." (*People v. Johnson* (1981) 123 Cal.App.3d 106, 109.)

DISPOSITION

The judgment is affirmed. The superior court is directed to amend the abstract of judgment to accurately reflect the restitution fines imposed under Penal Code sections 1202.4, subdivision (b) and 1202.45 and to transmit certified copies of the amended abstract to all appropriate parties and entities.

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3 Appellant's supplemental letter brief filed February 22, 2001, does not expressly state that ineffective assistance of counsel is the basis for challenging his prior felony conviction. However, in a further supplemental letter brief filed August 7, 2001, appellant states:

> ". . . Therefore giving me the ability to [make] a constitutional challenge . . . I then reinforce my stance of ineffective counsel by case lawyer, Eric Green; thereby giving me the right to appeal my prior plea bargain because I have not waived my rights on this matter."